

**U.S. Department of Labor**

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**Issue Date: 17 December 2003**

**CASE NO.: 2003-AIR-22**

**IN THE MATTER OF**

**JOHN A. ROBINSON**  
**Complainant**

**v.**

**NORTHWEST AIRLINES, INC.**  
**Respondent**

**DECISION AND ORDER**

**Background**

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Public Law 106-181, 49 U.S.C. §42121, (“Act”). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (“FAA”) or any other provision of Federal law relating to air carrier safety.

John A. Robinson, Jr. (“Complainant”) filed a complaint with the Department of Labor against his employer, Northwest Airlines, Inc. (“Respondent”) alleging discrimination against him in violation of the Act in retaliation for his having communicated safety and regulatory concerns both to Respondent and the Federal Aviation Administration (“FAA”). On March 24, 2003, the Regional Administrator for the Occupational Safety and Health Administration, (OSHA), determined Complainant’s complaint had no merit. Specifically, OSHA determined Respondent’s actions were not related to safety

complaints, but rather were in accordance with the union contract and based upon the observations of Complainant's supervisor. Complainant objected to OSHA's findings, and by letter dated March 28, 2003, filed a request for formal hearing.

This matter was referred to the Office of Administrative Law Judges (OALJ) and assigned to me. Following a telephonic conference with both parties, by agreement this case was eventually set for hearing on August 26, 2003. Following the hearing, by agreement, the parties were granted until November 14, 2003, by which to file post-trial briefs.

The trial in this case lasted 2 days and involved five witnesses as well as 9 Administrative Exhibits, 8 Complainant's exhibits and 27 Respondent's Exhibits. The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

### **Issues**

1. Whether the Office of Administrative Law Judges has subject matter jurisdiction;
2. Whether the Complainant engaged in protected activity under the Act;
3. Whether the Respondent knew or had knowledge that Complainant engaged in protected activity;
4. Whether the action taken against Complainant was motivated by Complainant's engagement in protected activity; and
5. What damages, if any, the Complainant is entitled to.

## **Summary of Relevant Evidence**

### **Complainant**

Complainant has an extensive history as a pilot, both before and after his employment with Respondent. He has been with Respondent since December 6, 1991, after winning an EEOC age discrimination complaint. At the time of his employment he was awarded seniority retroactive to 1985. Complainant flew as a second officer and co-pilot thereafter until reaching first officer status. In the course of his career he has flown DC-10's, 747's and 757's. Complainant testified he was never suspended or disciplined for conduct, and as of January, 2002, when he was pulled from duty, he was a first officer on the 757 and had passed his flight medical examination the previous October.

Complainant's birthday is January 30, 1942, and aware that after reaching age 60 he could no longer fly in the capacity of captain, but hoping to fly until he was 70, Complainant planned to continue his career as a flight engineer and was scheduled for such training in February 2002.

On May 1, 2001, Complainant testified he was first officer on a 747 flight from Detroit to Amsterdam. He observed security officers checking passengers for currency violations. He learned that two were detained, but their bags were still checked through on the flight. Concerned over what he termed the "positive bag match rule," after conferring with his caption, Complainant called for the removal of the detained passengers' luggage, but dispatch refused. During the flight to Amsterdam, Complainant said the crew discussed the event and he agreed to inquire further into the incident. Which he did upon their return to the states.

Complainant testified he called FAA and they agreed to "look into it." He also called the union representative in Detroit and asked him to do the same. Over the next month, Complainant had several conversations with the two. He said at FAA's suggestion he wrote a 10 page report on June 25, 2001 (CX 2) which he later copied to other pilots including a "cc" to Osama bin Ladan whom he described as "probably the world's most notorious and elusive terrorist." (CX 3). This gesture, Complainant explained, he did to make his point.

According to Complainant nothing was said about his report until September 2001, when chief pilot Jack Balliet asked Complainant why he had written such a letter. Following that event, however, Complainant testified that based on seniority he qualified for the 757's on November 28, 2001, having passed his first

class medical examination on October 3, 2001. After that time, Complainant maintains no other event occurred until December 23, 2001.

On December 23, 2001, Complainant testified that while preparing to check in for a flight he became locked in a baggage room at the Detroit airport used by the pilots, and it took 45 minutes for him to be rescued from behind the locked door. He explained the key pad was on the outside of the door and he had no means to activate it. Following his rescue, he flew his scheduled flight and reported the incident and subsequently asked for the taped conversation while he had been entrapped in the room. (RX 8).<sup>1</sup>

Complainant said nothing more was mentioned of the December event until January 16, 2002, when his chief pilot, Caption Jack Balliet, took him off of flight status with pay and told Complainant, pursuant to Section 15 of the Pilots Collective Bargaining Agreement, that he wanted him to be evaluated by a psychiatrist. (RX 9). Thereafter, on January 31, 2001, Complainant was initially seen by Dr. O'Connor (a psychiatrist) and Dr. Elliott (a psychologist). He again saw Dr. O'Connor on February 14, 2002, and Complainant said his visit lasted 12 hours. During the occasion of his visit with Dr. O'Connor in Los Angeles, Complainant acknowledged he sent Caption Balliet the post card found at Respondent's Exhibit 13 with a handwritten remark thanking Caption Balliet for the vacation and saying "it's driving me absolutely goofy."

On March 21, 2002, Complainant stated that his use of jump seat travel status was removed, but agreed he was still allowed standby travel status. (RX 14). Thereafter, on April 4, 2002, Complainant testified his employment status was changed to a non-active flight status and he was placed on long term sick leave. (RX 18).

Complainant maintains after exhausting his sick and vacation leave, he used his 401K (approximately \$64,000.00), and in December 2002, he requested retirement. (RX 22). This he said was an act of desperation on his part, and he seeks to be reinstated as a flight engineer with front pay until age 70, that his passes and medical benefits be reinstated and he be made whole for the loss of his 401K, plus expenses and attorney's fees.

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<sup>1</sup> Oddly enough though in Detroit, during his confinement apparently Complainant called Minnesota to report his dilemma.

As far as the Section 15 medical evaluation, Complainant acknowledges that he had the contractual right under the bargaining agreement to seek another opinion, but did not do so because he did not view Dr. O'Connor's opinion as valid since it was not determined he had a severe personality disorder. Complainant did, however, grieve the requirement of the medical examination to the System Board of Adjustment, who by Decision dated November 4, 2003, found no Section 15 violation on the part of Respondent (Respondent's post-hearing exhibit A).<sup>2</sup>

Complainant agreed, on cross examination, that a pilot's job is stressful and he acknowledged pilot fitness and safety is a serious matter. As to the Amsterdam incident, Complainant agreed if the event troubled him so he could have refused the flight, and that pursuant to the flight operation manual where a passenger is removed for reasons beyond the passengers control luggage is not required to be taken from the flight. (CX 1).

### **Captain Jack Balliet**

Captain Balliet is the chief pilot for the Respondent and has been since 1999. He has been with Respondent since 1985, and in addition to administrative duties he also flies 757's and instructs. He has 2600 pilots under his command. He is a union member, and testified that both he and Respondent are committed to air safety. He also explained that being a pilot involves stress and that one should neither "hurry" nor "joke" in stressful situations.

Captain Balliet testified that Detroit, where he is based, is a major hub with 700-800 flights per day and as many as 300 pilots assigned there. He said he had seen Complainant several times in his office, and on one such occasion Complainant had shaken his finger in anger at his staff. Captain Balliet, a much smaller man than Complainant, denied ever touching Complainant, but on that occasion did demand he apologize to the staff. Sometime later, Captain Balliet recalled he also received a letter from FAA complaining of Complainant's "threatening behavior" to their staff and suggesting Complainant did not "need to be in the cockpit of any airline in his present state of mind." (RX 19). Captain Balliet said he passed that letter to the union.

Following Complainant's June, 25, 2001, letter with the subsequent "cc" to Bin Ladan, Captain Balliet testified he investigated the incident and was told by

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<sup>2</sup> Complainant objects to the post-trial submission of this decision on the grounds it is not binding and deals only with the contractual grievance issues. While I agree it is not binding on my investigation, I admit the same as RX "A" for purpose of completeness of the record.

the other crew members of that Amsterdam flight that they had nothing to do with the writing of the report. He said he then made an inquiry of Complainant when Complainant came to his office, but he adamantly denied that any pilot with Respondent's airline had ever been disciplined for FAA complaints.

After Christmas that year, Captain Balliet said he first heard of Complainant's bag room episode and requested a copy of the taped conversation that took place while Complainant was locked within. (RX 8). In his mind, he said the tape depicted a person out of control and he became concerned over Complainant's pattern of behavior. What followed was what Captain Balliet believes to be a legitimate Section 15(b) request which ultimately led to Complainant's examination by Dr. O'Connor and his flight status and jump seat privilege being removed. Concern over safety, Captain Balliet said, was his sole motivation for the action taken and was concurred in by both Respondent's Medical Director and Respondent's attorney. Specifically, as to Complainant's behavior in the bag room, he testified:

. . . my concern was my goodness of course you're locked in the bag room, I understand that. I, I – and the making the call, I'm surprised he didn't call upstairs, but whatever he had – fine, communicate with scheduling, that's okay. But we all listened to the tape. My obviously subjective concerns were – he comes back, exacerbated, that excited over that he had to wait a few minutes until this door is open. What would happen in the cockpit with 400 people on board landing in the weather and you lose an engine? You've got to react pretty quick. What would happen if on rotation a snowy night, you have an engine fire? You all have to be very collected, very analytical, very cool. Of course – but I mean you maintain. He became this excited, this out of control, this anxious over being in a 10 by 12 room, there was no peril, there's no danger. (Tr. 232).

### **Christine Wolff**

Ms. Wolff is with Respondent's retirement department. She explained that an employee must terminate his employment in order to receive retirement. In this instance, she stated that Complainant had done so and that his application (RX 22) had been approved.

**Dr. David Zanick, M.D.**

Dr. Zanick is Respondent's medical director and review officer. He is also an aviation medical examiner. He explained that pilots must be mentally and physically fit for duty, and a personality disorder, if severe, could obviously interfere with one's ability to function and communicate as a pilot.

Dr. Zanick explained that under Section 15(b) of the collective bargaining agreement between the pilots union and the airline that if Respondent questions the ability of a pilot it may seek an evaluation of the pilot. The results are then sent to the medical examiner and a determination is made. He emphasized that Section 15(b) is not a punitive measure, but rather a matter of safety. He also emphasized that the date of a last routine medical examination is immaterial if the company has reason to suspect a pilot has developed an impairment to his ability to perform his duties. Which, he said, was the concern in this instance.

Dr. Zanick testified he was aware of Complainant from a previous episode where Complainant complained of being bitten by a monkey while in India. He testified that based on the various events told him by the chief pilot and company attorney, culminating in Complainant's behavior in the locked room, that he believed "reasonable cause" existed to request a Section 15(b) evaluation, for it was his philosophy that it was better to error on the side of safety. He also pointed out that flying could cause much greater stress than being locked in a room.

Dr. Zanick said he chose Drs. O'Connor and Elliott, both of whom are highly regarded in the airline industry and with FAA, to perform the evaluation. Upon receipt of Dr. O'Connor's report (RX 11), Dr. Zanick said he accepted Dr. O'Connor's opinion that absent counseling Complainant was unfit to fly. Consequently, he wrote his letter of April 5, 2002, to Respondent's attorney advising of Dr. O'Connor's opinion. (RX 20). He clarified that Dr. O'Connor's and Dr. Elliott's opinions simply recommended 60 days therapy for a personality disorder, after which Complainant would be reassessed to determine if his disorder was severe enough to interfere with his ability to safely operate an air craft.

In explaining how he arrived at "reasonable cause" for the Section 15(b) evaluation, Dr. Zanick agreed that he did not interview the Complainant, but through the many things he was told, such as the lack of conciseness in the way Complainant related information in his letter of June (RX 6), the reference to bin Laden, the manner in which Complainant presented himself to staff and in the grievance hearings and his reaction to being locked in the baggage room, all led to

his conclusion that Complainant should be evaluated in order to determine if Complainant's personality disorder was severe enough to interfere with his ability to fly. He also pointed out that Dr. O'Connor's conclusion was arrived at after spending a number of hours with Complainant who had brought volumes of paper to the session. Dr. Zanick too observed that under Section 15, had Complainant wished he could have gotten a second opinion, but he chose to not do so.

### **John Nelson**

Mr. Nelson is Respondent's labor attorney. He testified that Section 15 of the collective bargaining agreement is used to assist Respondent in its obligation to operate its airlines with the highest degree of safety.

He testified he was aware of Complainant and had been for some time prior to the Section 15 recommendation. Following Complainant's poor presentation before an arbitrator over his need for medical attention following a monkey bite, Mr. Nelson said it had come to his attention by the then Chief Pilot that Complainant might be in need of a Section 15 evaluation; however, no action was taken. Then when such a suggestion came up a second time, and he listened to the taped conversation of Complainant while locked in the baggage room and was told about the FAA episode and the bin Laden reference, he concurred that the matter should be presented to Dr. Zanick. Once that was done, he testified it was the consensus of himself, Dr. Zanick and Captain Balliet that the bag room episode, in context with Complainant's other past conduct, justified a Section 15 evaluation. Wrongdoing was never the issue and, and no write up was put in Complainant's file.

### **Findings of Fact**<sup>3</sup>

1. Respondent is an air carrier as defined by the Act; and Complainant was an employee protected under the Act;
2. Complainant was a pilot with Respondent's airline from 1991 until he retired in 2003. He, like all such pilots, was represented by the Air Line Pilots Association ("ALPA"), and the terms and conditions of his employment were governed by the collective bargaining agreement between ALPA and Respondent ("the Pilots Agreement");

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<sup>3</sup> The conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact and briefs, for where I agreed with summations I sometimes adopted the statements rather than rephrasing the sentences.

3. Section 15 of the Pilots Agreement addresses pilot fitness. (RX 4). That section provides a procedure that enables the company to ensure that pilots are medically qualified:

If the Company has reasonable cause to believe that a pilot has developed a medical impairment to his ability to perform his duties between the routine medical examinations required by the Federal Aviation Administration (FAA), the Company may require said pilot to submit a medical examination from a non-AME medical doctor chosen by the Company.

NOTE: This Paragraph B, shall not preclude the Company from requiring a pilot to submit to a medical examination under the following circumstances: [...] (iii) election for continued flying as a Second Officer beyond the regulated age (see Section 24.M.).

*Id.* at § 15.B.1, 15.B.2. The “regulated age” is 60. *Id.* at § 24.M.

4. Any pilot who is found to be unfit may obtain a second opinion from “a qualified medical examiner of his own choosing and at his own expense.” *Id.* at § 15.D.1. If the doctor selected by the pilot disagrees with the initial diagnosis, the two physicians will appoint a third disinterested medical examiner. *Id.* at § 15.D.3. The disinterested examiner’s opinion is dispositive. *Id.* at § 15.D.4. If second or third opinions are not secured, the airline is left to rely on the only available medical determination.
5. Section 26.P of the Pilots Agreement and the Flight Operations Manual govern jump seat access. In the event of an emergency, jump seat occupants are expected to support the flight crew. RX 15; T.236 (Balliet). According to Respondents’ medical review officer, Dr. Zanick, a person whose mental health is in question cannot be relied upon during an in-flight crisis. Furthermore, under § 26.P of the Pilot Agreement, jump seat availability is discretionary with the flight captain and intended for those who can assist in safety situations.

6. Complainant was a frequent visitor in the office and to the staff of Detroit Chief Pilot Jack Balliet. On one such visit, Complainant alarmed Balliet's female office staff with his "very combatant, very belligerent monologue, including finger shaking." Balliet concluded that the behavior was unusual and directed Complainant to apologize to the staff.
7. In September 2000, Brian Romer of the Federal Aviation Association sent a letter regarding Complainant to Balliet. (RX 19). Complainant had apparently sought a taped conversation and became quite upset with the FAA when he did not receive it. According to the letter, Complainant made several rude telephone calls, then lurked outside the control tower's security gate, demanding entry to the secured facility. Romer reported that Complainant's behavior upset two FAA employees. One, who was a certified flight instructor, said that "if I knew that he was the pilot on an aircraft, I would never get in it. In my opinion, I do not believe that he needs to be in the cockpit of any aircraft in his present state of mind." (RX 19).
8. Subsequently, Complainant filed a grievance and represented himself in a hearing seeking money for additional inoculations after he was bitten by a monkey in India. Respondent's labor relations attorney John Nelson received a report from then Chief Pilot Gary Skinner that Skinner was concerned about Complainant's incapability of rationally assembling or conveying his thoughts. Skinner recommended a § 15B examination at that time.
9. On June 25, 2001, Complainant wrote a 10-page letter to Rhonda Haymaker at the FAA concerning passenger luggage being left on a flight after U.S. Customs detained its owners. (RX 6). Complainant ended the letter with the following:

Since it is now common knowledge that Osama bin Laden (Probably the world's most notorious and elusive terrorist-once a C.I.A.-sponsored operative against the U.S.S.R. in Afghanistan) uses the internet in a coded fashion to dispatch messages to his far-flung deputies; furthermore since it is U.S. Government protocol that my letter herein becomes readily available to the public-at-large through the Freedom-of-Information Act: Essentially I am sending a copy of this letter to Osama

bin Laden (in absentia) for his further disposition/consideration.

10. On December 23, 2001, Complainant became locked in a pilot luggage room at the Detroit passenger terminal. Other pilots were outside the door and there was apparently no danger, yet Complainant became quite upset. A tape recording of his cellular phone call to Pilot Scheduling indicates that Complainant suggested that the fire department should execute an emergency rescue or that the door should be blown away with a bazooka. (RX 8).
11. Complainant testified at trial that he made a complaint about the bag room door being unsafe, however, no evidence of a written safety complaint was presented, and neither Captain Balliet nor attorney Nelson were aware of any.
12. The bag room incident, coupled with Complainant's prior conduct, caused Respondent to suspect that Complainant's ability to pilot an aircraft had become impaired. Chief Pilot Balliet consulted with attorney Nelson, who in turn involved Respondents' medical review officer, Dr David Zanick. All three considered Complainant's history and jointly decided that Complainant's behavior rendered a § 15.B evaluation an appropriate request. On January 16, 2002, invoking § 15.B of the Pilots Agreement, Captain Balliet withheld Complainant from service and placed him on paid leave. He also directed Complainant to undergo a fitness for duty examination. (RX 9).
13. Psychiatrist Garrett O'Connor, M.D. examined Complainant in Los Angeles on January 31, 2002 and February 14, 2002. Complainant traveled to Los Angeles on company passes, and while in Los Angeles Complainant sent Balliet a postcard:

DEAR CAPTAIN JACK BALLIET:

THANKS FOR ARRANGING MY NEWFOUND "CB"  
COMPANY BUSINESS "VACATION" HERE IN  
SOUTHERN CALIFORNIA! IT'S DRIVING ME  
"ABSOLUTELY GOOFY."

RESPECTFULLY,

John Robinson

“MONKEY PILOT”

cc: ALPA

14. Concerned over his psychological status and inability to cope with stress, Respondent banned Complainant from jump seat access pending the results of Dr. O'Connor's exam. Although Complainant could not ride the cockpit, Respondent accommodated Complainant with a “positive space” travel arrangement for company related business such as his psychological exam. For his personal travel, Complainant could, and did, fly on a “standby” – i.e., space-available – basis at nominal cost, as is so with any leisure-traveling Northwest employee.
15. On March 28, 2002, Dr. Garrett O'Connor submitted a 10-page letter with attachments to Dr. Zanick stating that Complainant was in need of cognitive-based counseling, stating: “at this time it is my opinion that Captain John Robinson is not currently fit for duty as a commercial aviator.” (RX 11). Dr. Zanick relayed Dr. O'Connor's assessment to Respondent and Complainant's status was changed to “sick leave.” (RX 20).
16. Notwithstanding his contractual right to seek an independent evaluation, Complainant did not challenge Dr. O'Connor's assessment. Complainant also did not pursue the counseling prescribed by Dr. O'Connor. Consequently, Dr. O'Connor's opinion is the only medical assessment on the record regarding Complainant's mental condition, and given that unchallenged opinion reinstating Complainant was not an option for Respondent.
17. Complainant remained on sick leave until February 2003, when his accrual expired. Complainant thereafter applied for retirement, knowing that the Pilots Pension Plan requires a returning pilot to completely terminate his employment relationship with Respondent. Complainant retired on June 30, 2003, collecting pension benefits beginning in August 2003. (RX 21, 22).

18. In addition to his OSHA complaint, Complainant filed a contractual grievance contending that Respondent retaliated by requiring him to undergo a medical exam and revoking his jump seat privileges (RX A). After reviewing the evidence, the System Board of Adjustment concluded Complainant was not the victim of retaliation, and that the airline had reasonable cause to require a fitness for duty exam and institute a jump seat restriction:

Based on all [Robinson's past incidents], the Board cannot find a basis of retaliation or harassment in the Company's requiring Robinson to undergo a Sec. 15.B.1 exam. While the Company might arguably be at fault for not having acted on its concern for "public safety" either following the Roemer letter or the Osama bin Laden message, its hesitancy in involving 15 B.1 until the bag room incident does not rise to finding a retaliatory action.

*Id.* at 14.

### **Conclusions of Law**

The employee protection provisions of the Act are set forth at 49 U.S.C. §42121 (passed April 5, 2000). Subsection (a) describes discrimination against airline employees as follows:

No air carrier or contractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) provided, caused to be provided, or is about to provide (with any kind of knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

The law developed under the whistleblower protection provisions of the Energy Reorganization Act of 1974 (“ERA”), as amended in 1992, the Whistleblower Protection Act (“WPA”) and environmental statutes provide the framework for litigation arising under the Act. The statutory scheme established by the Act essentially mirrors the protective provisions of the prevailing nuclear and environmental statutes. The exception is that the Act provides extraordinary powers to OSHA to order immediate reinstatement of airline employees upon a showing of reasonable cause. Accordingly, the jurisprudence developed under existing whistleblower statutes will be applied to the instance case.

Under the Act, complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. When the complainant reaches the hearing stage, the complainant must demonstrate, by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in the employer’s alleged unfavorable personnel decision. Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

Both at the hearing and in its post-hearing brief, Respondent takes the position that the Department of Labor lacks subject matter jurisdiction over this claim. Specifically, Respondent urges that the Railway Labor Act, 45 U.S.C. § 151 (a) et seq., provides the sole procedure for employment dispute resolution

requiring the interpretation and application of the collective bargaining agreement, and that judicial consideration of such claims are prohibited. In other words, Respondent maintains this dispute can be resolved only by the system board created by the Railway Labor Act; and inasmuch as the Board has ruled in this matter (RX A), the Department of Labor has no jurisdiction or authority under the AIR 21 Act to inquire into Respondents' "reasonable cause" for invoking §15.B..

As I held at the hearing, and now do so again (Tr. 17), I do not agree with Respondent that I am preempted from investigating Respondents' motivation in using §15.B of the collective bargaining agreement in order to have Complainant evaluated or investigating Respondent's actions thereafter. I agree that I can neither ignore nor alter the terms of the collective bargaining agreement. Yet to say that the Department of Labor is prohibited from inquiring into Respondent's true purpose with respect to its use of the collective bargaining agreement, and the actions thereafter taken, when an employee engages in conduct protected by the Act, would render the employee protection provisions meaningless and potentially provide an employer with a weapon for retaliation.

I can only presume Congress was aware of existing laws when enacting new legislation, and in this instance I do not find that the Railway Labor Act preempts the employee protection provisions of AIR 21 Act. They serve dual purposes. Granted, Complainant sought and lost his grievance before the System Board (RX A), but in issue there was not the employee protection provisions of the AIR 21 Act, rather in issue was contractual terms of the collective bargaining agreement. In other words, Complainant's loss in that forum does not, in my opinion, preclude his complaint in this forum.

Turning to the merits of Complainant's complaint, it is my finding that Complainant has not demonstrated that his engaging in protected activity was a contributing factor to Respondent's invocation of Section 15.B of the collective bargaining agreement or the removal of Complainant's jump seat privileges. To the contrary, I find Respondent would have taken the same personnel action in the absence of any protected activity on the Complainant's part.

Both parties are covered by the Act; and Complainant's Exhibit 2 is the June 2001 letter Complainant wrote concerning the removal of luggage from an aircraft when the passengers attached to that luggage were forcibly detained by the authorities. Although September 11 had yet to occur, and there is some dispute that the luggage in such an instance was required to be removed, I find that this was arguably a safety concern that amounted to protected activity under the Act

and of which Respondent was made aware. However, as to Complainant's later episode of being locked in the room, I find no evidence of record that Complainant expressed a safety concern regarding this instance.

Whether Complainant's evidence is sufficient to raise a reasonable inference that any protected activity on his part was likely the reason for Respondent's actions in having him evaluated, it is my finding Complainant has failed in his initial burden of proof to make a prima facie case. However, even if he met that burden, I find that Respondent has shown by clear and convincing evidence that it would have taken the same action in the absence of any protected activity on Complainant's part, and Complainant has failed to contradict that evidence.

Decisions made by Respondent regarding flight safety are entitled to difference, and in this instance given Complainant's pattern of conduct over time leading up to the baggage room event, his outburst in that instance appears sufficient enough to cause Respondent to be concerned about Complainant's potential conduct in the cockpit once under stress.

The thrust of Complainant's case is no Section 15.B evaluation was initiated until after his June, 2001, FAA letter voicing safety concerns, that he had successfully passed his FAA flight physical in October 2001, his seniority promotion to captain had taken place in November of 2001, and after his 60<sup>th</sup> birthday he was slated to fly as a flight engineer. Respondent, however, through the testimony of its chief pilot, medical advisor and labor attorney establishes that safety was and is the primary concern and that the several events culminating in Complainant's recorded reaction to being locked in the baggage room in December, 2001, caused them to be of the unanimous opinion that there existed good reason to request a Section 15.B evaluation.

Following that evaluation by Dr. O'Connor, Complainant did not exercise his right to a second opinion. Therefore, the only medical evidence of record is Dr. O'Connor's recommendation that Complainant was unfit to fly, leaving Respondent with no alternative but to remove him from the cockpit. Until that time Complainant had been on paid leave, but after his refusal to comply with Dr. O'Connor's recommendation of counseling he was placed on sick leave (RX 18) and ultimately retired from the airlines. Had Complainant chosen to get a second opinion or accept the 60 day counseling there is no reason to believe he could not have continued his career with Respondent.

Complainant was a pleasant enough person at the trial; however, throughout the presentation of his case it appeared, as Dr. O'Connor noted, he sometimes "had difficulty in making himself understood, and the sequence of his thought process was sometimes hard to follow. . . ." (RX 11). A reading of Complainant's June 25, 2001, letter (CX 2, 3) to some extent evidences this same quality in his writing, and when coupled with the outburst in Captain Balliet's office and with FAA personnel and as captured on tape while in the locked baggage room in December, 2001, one is able to understand the reasoning of Captain Balliet, Dr. Zanick and attorney Nelson when they unanimously concluded that Complainant's behavior should not remain unnoticed so long as he was employed as a commercial airline pilot. The invocation of Section 15.B was not a punishment, but simply a safety measure during which time Complainant remained in pay status; and, as previously stated, had he followed the advice of Dr. O'Connor there is no suggestion that his employment would not have continued.

As to the removal of jump seat privileges, that too was in tandem with the Section 15 and did not deprive Complainant of his unrestricted space travel privilege which allowed him to continue flying as a passenger. (RX 14). As explained by Dr. Zanick, the removal of the jump suit privilege was consistent with safety concerns pending the outcome of Dr. O'Connor's evaluation inasmuch as an occupant of that seat could be expected to support the flight crew in an emergency.

### **Conclusion**

The real issue presented is whether Respondent violated the employee protection provisions of the Act by sending Complainant for a fitness for duty examination and barring him from the jump seat as retribution for expressing safety concerns. It is my finding that there is no evidence which indicates these actions taken against Complainant were based on any safety concerns expressed in his letter to the FAA written some six months earlier. Therefore, the complaint is **DISMISSED**, and Respondent's request for \$1,000.00 attorney fees is **DENIED**.

So ORDERED this 17<sup>th</sup> day of December, 2003, at Metairie, Louisiana.

**A**

C. RICHARD AVERY  
Administrative Law Judge

CRA:kw

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).